

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 17 March 2005**

In the Matter of:

IOLA C. KEEN, Widow of  
GEORGE KEEN (Deceased),  
Claimant,

Case No. 2004-BLA-88

v.

SEA B MINING COMPANY,  
Employer,

and

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS  
Party-in-Interest.

Appearances:

Sparkle Bonds, Lay Representative  
For the Claimant

Timothy W. Gresham, Esq.  
For the Employer

BEFORE: THOMAS M. BURKE  
Administrative Law Judge

**DECISION AND ORDER - AWARDING BENEFITS**

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. 901 *et seq.* (the Act). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis may also recover benefits. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a).

On February 24, 2004, this case was referred to the Office of Administrative Law Judges for a formal hearing. A hearing was scheduled in this matter for September 1, 2004, however, Claimant's representative requested that this matter be decided on the record, a request to which Employer did not object. Accordingly, an Order Cancelling Hearing and Granting Request for

Decision on Record was issued on August 20, 2004. The Order admitted Employer's exhibits 1 through 9 into evidence and granted the parties thirty days in which to file closing arguments. Employer and Claimant have both submitted closing arguments. The record is now closed.

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the regulations.

The Acts implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX and EX refer to the exhibits of the Director and Employer, respectively.

### ISSUES

The following issues remain for resolution:

1. Whether the Miner was totally disabled;
2. Whether the Miner's disability or death was due to pneumoconiosis;
3. Whether the evidence establishes a material change in condition pursuant to Section 725.309(d);
4. Whether the evidence establishes a change in conditions and/or that a mistake was made in the determination of any fact in the prior denial pursuant to Section 725.310; and,
5. Whether the Director has the authority to reverse a finding of the Benefits Review Board and the Office of Administrative Law Judges.

(DX 53, 54).

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

#### Factual Background

The Miner, George Keen, was born on April 2, 1917. He had an eleventh grade education. (DX 1-3). Mr. Keen married Iola Campbell on April 8, 1939 and they remained married until his death on November 10, 2000. (DX 3, 9, 44). The Miner had one dependent for the purposes of possible benefit augmentation.

## Procedural History

Mr. Keen filed his first application for benefits on October 2, 1978. (DX 1). It was denied after a hearing held before Administrative Law Judge Edward J. Murty, Jr., who determined that the Miner had established thirty-seven years of coal mine employment ending in 1979, but that he had failed to establish entitlement to benefits under the Part 727 regulations. The Claimant filed a timely appeal, and on October 12, 1983, the Benefits Review Board ("Board") issued its decision and order, remanding the matter for further consideration consistent with its opinion. (DX 1). On December 2, 1983, Judge Murty issued a Decision and Order on Remand, again denying the claim. The Miner filed an appeal with the Board on January 17, 1984, and on August 28, 1984, he filed another application for benefits. (DX 2). That application was denied after a formal hearing held before Administrative Law Judge Robert L. Hillyard, in a Decision and Order dated May 28, 1991. (DX 2). Therein, Judge Hillyard determined that the Miner had established the existence of coal worker's pneumoconiosis but had failed to establish that he was totally disabled by the disease pursuant to 20 C.F.R. Part 718. A Motion for Reconsideration was filed on June 18, 1991, on the grounds that the pertinent regulations had not been utilized, given that the application, having been filed within a year of the prior denial, was in actuality a request for modification. Judge Hillyard issued a Decision and Order on Reconsideration, denying benefits on September 19, 1991, utilizing the regulations found at Part 727. (DX 2). The Miner filed an appeal with the Board on June 20, 1992 and on October 22, 1993, the Board affirmed Judge Hillyard's denial of benefits. (DX 2). The Miner then filed an appeal with the United States Court of Appeals for the Fourth Circuit, which affirmed the Board's decision on September 26, 1994. (DX 2).

On July 29, 1996, the Miner filed the instant application for benefits. (DX 3). It was denied after a formal hearing held before Administrative Law Judge Stuart A. Levin, by Decision and Order dated January 25, 1999. (DX 37). Therein, Judge Levin found thirty-eight years of coal mine employment and that the Miner had failed to establish total disability due to pneumoconiosis, although he had established the existence of simple pneumoconiosis. Judge Levin discussed the issue of complicated coal worker's pneumoconiosis and determined that while two physicians had found the existence of complicated coal worker's pneumoconiosis on chest x-ray, and one physician had found that to be the case on a CT scan, the weight of the readings indicated otherwise. Judge Levin also found the medical report evidence insufficient to establish the existence of complicated coal worker's pneumoconiosis, noting however, that Drs. Forehand and Sargent found same to be a possibility. The Miner filed an appeal with the Board, and on February 29, 2000, the Board issued a Decision and Order affirming Judge Levin's Decision and Order. (DX 38, 42). A motion for reconsideration, as filed by the Miner, was denied by the Board on April 13, 2000.

The Miner died on November 10, 2000, and his widow, the Claimant, herein, forwarded a copy of her husband's death certificate and autopsy report.<sup>1</sup> (DX 44, 45). On November 14, 2002, the Director, Office of Workers' Compensation Programs, issued a Proposed Order to Show Cause Granting Request for Modification. (DX 46). Employer indicated its rejection of

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<sup>1</sup> The date of receipt of the new medical evidence is not in the record, however, the Employer does not contest that it was filed within a year of the prior denial. In its closing argument, Employer states that the evidence was received on January 19, 2001.

the Proposed Order, and an Amended Proposed Order to Show Cause was issued on December 17, 2002, which was also rejected by Employer. (DX 47-49). A Proposed Decision and Order Granting Request for Modification was then issued by the Director on October 29, 2003, and on November 24, 2003, Employer filed a timely request for a hearing. (DX 52, 53). This matter was then forwarded to the Office of Administrative Law Judges on February 24, 2004. (DX 54).

### Coal Mine Employment

The duration of the Miner's coal mine employment is not at issue herein, thirty-eight years having been established.

### Responsible Operator

Liability for payment of benefits to eligible miners and their survivors rests with the responsible operator or, if the responsible operator is unknown or is unable to pay benefits, liability is assessed against the Black Lung Disability Trust Fund. Employer herein does not contest that it was properly designated the responsible operator herein.

### Applicable Regulations:

Because this claim was filed after March 31, 1980, the effective date of Part 718, it must be adjudicated under those regulations. Amendments to the Part 718 regulations became effective on January 19, 2001.

### Modification of a Duplicate Claim<sup>2</sup>:

In cases where a claimant files more than one claim and the earlier claim is denied, the later claim must also be denied on the grounds of the earlier denial unless there has been a material change in condition or the later claim is a request for a modification. Section 725.309(d). The Miner's first claim was filed in 1978 and resulted in a final denial by the United States Court of Appeals for the Fourth Circuit in 1993. He filed another claim in 1996 which was denied in 2000 by the Board. The Miner died on November 10, 2000, and his widow, the Claimant herein, submitted additional medical evidence in support of her husband's application for benefits within one year of the denial of the Miner's 1996 application for benefits.

The second claim was filed in April 1996, not within one year of the prior denial. It was denied by the Board in 2000, and the Claimant filed a timely request for modification. Accordingly, this matter is here on a request for modification of a duplicate claim.

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a) and as implemented by 20

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<sup>2</sup> As noted above, amendments to the Part 718 regulations became effective on January 19, 2001. However, pursuant to §725.2, amendments to 725.309 and §725.310 are not to be retroactively applied. Therefore, the regulations regarding the modification of duplicate claims as they existed prior to January 19, 2001, are applicable in this case.

C.F.R. §725.310, provides that upon a miner's own initiative, or upon the request of any party on the ground of a change in conditions or because of a mistake in a determination of fact, the fact-finder may, at any time prior to one year after the date of the last payment of benefits or any time before one year after the denial of a claim, reconsider the terms of an award of a denial of benefits. §725.310(a).

In deciding whether a mistake in fact has occurred, the United States Supreme Court stated that the Administrative Law Judge has

broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.

*O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

Furthermore, the Fourth Circuit Court of Appeals, under whose appellate jurisdiction this case arises, has held that a modification petition need not specify any factual error or change in conditions, and indeed, the claimant may merely allege that the ultimate fact - total disability due to pneumoconiosis - was wrongly decided and request that the record be reviewed on that basis. *Jessee v. Director, OWCP*, 5 F.3d 723 (4<sup>th</sup> Cir. 1993).

In determining whether a change in conditions has occurred requiring modification of the prior denial, the Board has similarly stated that

the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision.

*Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994).

Furthermore, "if the newly submitted evidence is sufficient to establish modification..., the administrative law judge must consider all of the evidence of record to determine whether claimant has established entitlement to benefits on the merits of the claim." *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), modified on recon., 16 BLR 1-71 (1992).

The instant request is for modification of the denial of a duplicate claim. Therefore, the evidence submitted in support of the Claimant's last claim will be assessed in conjunction with the evidence submitted in support of the motion for modification. If this evidence proves one of the elements of entitlement that formed the basis for the last denial of benefits, thereby establishing a change in condition or a mistake in a determination of fact, the Claimant will have demonstrated a material change in condition as a matter of law. Then, all evidence of record will be reviewed to determine entitlement to benefits. Previously it was determined that the Miner had established the existence of coal worker's pneumoconiosis but not total disability due thereto. Therefore, in the present case, the medical evidence submitted since the denial by the

Board will be reviewed in order to determine whether the Claimant can now establish a mistake in a determination of fact or a change in condition. The medical evidence previously submitted and discussed in the prior decisions is incorporated herein by reference and the newly submitted medical evidence will be examined to determine if the Claimant can now establish an element of entitlement previously adjudicated against the Miner.

### Medical Evidence

#### X-ray Evidence

A chest x-ray taken on November 20, 1979 was read as negative for pneumoconiosis by Dr. Bassham. (EX 1). Dr. Bassham noted mild cardiac decompensation (cardiac failure) as a pathology identified in the film.

Chest x-rays taken on April 30, 1997 and September 12, 2000 were read as negative by Dr. Scott, a B-reader and board-certified radiologist. (EX 2, DX 50). Dr. Scott found the 1997 x-ray to be indicative of infiltrate/fibrosis right upper lung compatible with healed TB, cannot rule out activity. He also found a possible small right pleural effusion. Dr. Scott read the September 12, 2000 x-ray as indicative of probable coronary artery bypass, cardiomegaly, vascular congestion and right pleural effusion: congestive heart failure. He noted an infiltrate and/or fibrosis right>left upper lung compatible with TB, unknown activity, apical pleural thickening: same etiology. Dr. Scatarige, a B-reader and board-certified radiologist, read the September 12, 2000 x-ray as negative for pneumoconiosis. (EX 7). He did find evidence of cardiomegaly, congestive heart failure and bilateral pleural effusions. There were also scattered focal infiltrates in the right apex, left apex, right upper lung and left mid-lung.

Chest x-rays taken on October 28, 2000, October 30, 2000 and November 2, 2000 were read by Dr. Patel for purposes other than classification of pneumoconiosis. (EX 4-6). He did note on the October 28, 2000 x-ray that there were changes which represented an acute process like pneumonia or residual changes of previous infection. He found no other definite pathology in the limited study of the October 28, 2000 x-ray. On the October 31, 2000 x-ray, Dr. Patel noted that there were changes suggestive of interstitial edema, which, with the appropriate clinical settings, would be considered secondary to congestive heart failure. The November 2, 2000 study showed some improvement in the previously described changes of congestive heart failure.

### Medical Reports

The deposition testimony of Dr. J. D. Sargent was taken on January 19, 1988. (EX 3). Dr. Sargent testified that he examined the Miner on July 14, 1987. At that time, he found the Miner to be disabled due to his congenital heart disease and his cor pulmonale.

The Claimant has submitted the Miner's death certificate, listing the date of death as November 10, 2000. (DX 44). Under Part I, the cause of death is listed as (1) cardiac failure, due to (2) cardiomyopathy (progressive), due to (3) coal worker's pneumoconiosis. (DX 44). Conditions listed as "Other significant conditions contributing to death but not resulting in the

underlying cause given in Part I," are "CHF, ITP, [illegible]." The death certificate is signed by Dr. Jack Briggs.

An autopsy was performed on November 10, 2000, by Dr. Joseph Segen at the Buchanan General Hospital. (DX 45). The Final Anatomic Diagnosis included (1) coal worker's pneumoconiosis, with changes of complicated coal worker's pneumoconiosis; (2) pulmonary hypertension; (3) emphysema; (4) pulmonary edema, mild; (5) healed myocardial infarction of anterior septal wall; and (6) atherosclerotic coronary artery disease. The microscopic description of the lungs revealed extensive involvement by coal worker's pneumoconiosis with lesions measuring up to 2 cm in greatest dimension, consisting of dust macules with coalescence and fibrosis partially surrounded by focal emphysema throughout the lungs. These changes were found to be most prominent in tissues obtained from the right upper lobe, left lower lobe and left hilar region. Both lungs were recorded as diffusely displaying anthracotic pigmentation on the surface and throughout the parenchyma with firm, blackened nodules measuring up to 1 cm. or more in greatest dimension. The hilar regions also demonstrated firm, anthracotically stained lymph nodes measuring up to 1.5 cm. in greatest dimension.

In a Consultation Report dated June 29, 2002, Dr. P. Raphael Caffrey indicated that he had reviewed medical records, including the death certificate, autopsy report, consultation report of Dr. Joshua Perper<sup>3</sup> and thirteen autopsy slides. Dr. Caffrey concluded, based upon his review, that while the Miner suffered from coal worker's pneumoconiosis, his major medical problem resulted from his atrial septal defect and his development of multiple cardiac problems and pulmonary hypertension. Dr. Caffrey stated that "what role the CWP played in Mr. Keen's death no one can say objectively." While he found that the Miner had coal worker's pneumoconiosis, in his opinion it did not contribute to death. Death was due to complications of cardiac disease due to his atrial septal defect, a congenital condition of the public which is not an occupational disease. Dr. Caffrey found that the autopsy slides of the lungs revealed pleural and subpleural fibrosis with at least one section showing some hyalinized old fibroid material along the surface with vascular congestion. Most all sections showed multiple macules, "that is coal dust with associated reticulin and focal emphysema, up to 15-20 macules per section." According to Dr. Caffrey, one slide showed one lesion consisting of dense collagen and anthracotic pigment measuring 1.8 cm by .8 cm. Another slide showed a large lesion consisting of dense collagen along with anthracotic pigment, measuring approximately 2.2 cm by 1.1 cm. His final diagnosis included moderately severe simple coal worker's pneumoconiosis with focal changes consistent with complicated coal worker's pneumoconiosis. It was his opinion that death was not due to pneumoconiosis.

In his deposition testimony taken on January 28, 2004, Dr. Caffrey reiterated his opinion as noted above, that the Miner suffered from complicated pneumoconiosis at the time of his death. (EX 9). Dr. Caffrey is board-certified in anatomic and clinical pathology. Dr. Caffrey also discussed his review of the medical report of Dr. Perper, which is not a part of this record. Dr. Caffrey explained that the Miner had moderately severe simple coal worker's pneumoconiosis and also complicated coal worker's pneumoconiosis. It was his opinion that the

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<sup>3</sup> By letter dated October 6, 2004, employer objects to the references made in Claimant's brief references to the medical report of Dr. Perper, which is not in the record, requesting that those references be stricken. That request is granted, as it is improper to rely in final argument upon evidence which is not a part of the record.

Miner had a significant degree of simple coal worker's pneumoconiosis with micro and macronodules. What is generally accepted, according to Dr. Caffrey, and what "most likely" happened in this case, was that a lesion of complicated pneumoconiosis developed "de novo from itself." Dr. Caffrey stated that he saw the greater than two centimeter mass in the slide marked "LL" and that if no one saw any large opacity in that area in 1997, it was very likely that that lesion developed after 1997. Dr. Caffrey also testified that it was possible that the Miner did not have complicated coal worker's pneumoconiosis in 1997 and that his simple coal worker's pneumoconiosis developed and coalesced into large opacities, as seen at autopsy, after 1997.

## **DISCUSSION**

It should be noted that Employer initially contended that the Director did not have the authority to determine that the prior decision of an administrative law judge or the Board was based on a mistaken finding of fact. (DX 53). In its closing argument, Employer concedes that the evidence submitted since the 1999 decision and order denying benefits proves the existence of complicated pneumoconiosis, and therefore, a change in conditions since the prior denial. Employer contends, however, that Judge Levin did not mistakenly decide the facts in rendering his decision in January of 1999, arguing that no evidence submitted since 1997 shows that the Miner had complicated pneumoconiosis at the time Judge Levin issued his decision. Employer further contends that the medical evidence does not establish the date the Miner became disabled by pneumoconiosis. It is Employer's position that because the medical evidence does not establish the date of the change in condition or onset of benefits and because there was no mistake in a determination of fact by Judge Levin, the date of onset of benefits can only be the day the Claimant requested modification. To so find would provide no benefits for the Claimant, given that the request for modification was filed after the death of the Miner and this application is for benefits for the Miner during his lifetime.

The modification provisions at §22 of the Longshore and Harbor Worker's Compensation Act, which are incorporated into the Black Lung Benefits Act provide the statutory authority to modify orders and awards. Under §22 and §725.310 an award in a black lung claim may be modified (increased, decreased or terminated) at the behest of the claimant, employer or director upon a showing of a change in conditions or a mistake in a determination of fact., and therefore, the director does have such authority.

With regard to the issue of the date on when benefits become payable, Section 725.503(b) states that benefits are payable with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment, and in the cases where the evidence does not establish the month of onset, benefits are payable beginning with the month during which the claim was filed. Section 725.503(d) further states that in the event of a claim having been awarded pursuant to Section 22 of the Longshore Act and §725.310, then the date from which benefits are payable shall be determined depending on whether the modification is based on a mistake of fact or a change in conditions. In the instance of a mistake of fact benefits are payable to a miner beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment, except where the evidence does not establish the month of offset, benefits are payable beginning with the month during which the claim was filed. The difference when the modification derives from a change of conditions is that although benefits are also payable



beginning with the month during which the claim was filed, no benefits may be payable prior to the effective date of the most recent denial of benefits. See 20 C.F.R. §725.503.

As it is conceded that the post-mortem evidence establishes the existence of complicated pneumoconiosis, which automatically entitles the Claimant to benefits pursuant to 20 C.F.R. §718.304, the issue, therefore, is whether the Claimant has established a mistake in a prior determination of fact, as opposed to a change in conditions since the prior denial. If the latter is the case, she is only entitled to benefits as of the date of the filing of the request for modification, which as noted, would provide her with no benefits.

As the Employer points out, there were findings of complicated pneumoconiosis made by Drs. Forehand, Navani, Sargent and Estes when this matter was reviewed by Judge Levin. Employer contends, however, that Judge Levin committed no mistake in a determination of fact when he concluded that the contrary evidence outweighed those findings. Employer further contends that the newly submitted evidence shows no mistake in that determination of fact, relying on the report and testimony of Dr. Caffrey who indicated that he only saw two lesions consistent with complicated pneumoconiosis on review of the autopsy slides and he opined that they most likely developed or progressed after 1997. Employer further argues that the lesions determined to be complicated coal worker's pneumoconiosis at autopsy were not seen on prior x-rays or CT scan. In this respect, Employer relies on Dr. Caffrey's statements that the lesions found on autopsy were in the left lung, while the x-rays from 1996 and 1997 were read as indicative of masses in the right lung.

Upon reviewing the medical evidence before me, it is apparent that substantial new evidence has been provided which was not before Judge Levin. Judge Levin, most obviously, given that the Miner was still alive, did not have the benefit of an autopsy report and slides. That evidence, now before the undersigned, is sufficient to establish, when weighed with the evidence submitted before Judge Levin, that a mistake in a determination of fact was made. Thus, the newly submitted medical evidence provides irrefutable evidence of that which, previously, there was only minimal evidence, i.e., that the Miner suffered from complicated pneumoconiosis. The new evidence also refutes the findings rendered by several physicians, that the Miner suffered from tuberculosis. The issue now becomes whether he suffered from complicated coal worker's pneumoconiosis at the time that Judge Levin had this matter before him, or whether it occurred as a change in conditions, i.e., a progression of his disease. In order to reach a resolution to this question, all the evidence must be reviewed. Pursuant to 20 C.F.R. §725.310, it is not enough that the administrative law judge conduct a substantial review of the evidence. Rather, the parties are entitled to *de novo* consideration of the issues. *Kovac v. BCNR Mining Corp.*, 14 BLR -1-156 (1990), *aff'd on recon.*, 16 BLR 1-71 (1992).

In this case, further reflection on the evidence initially submitted, when reviewed in conjunction with that newly submitted, leads to the conclusion that the evidence does meet Claimant's burden of proving a mistake in a prior determination of fact. In order to fully address this finding, the pertinent medical evidence reviewed by Judge Levin must be detailed. Thus, that evidence, consists of a chest x-ray taken on September 5, 1996, which was read as positive for complicated pneumoconiosis by Drs. Forehand and Dr. Navani, both of whom are B-readers, Dr. Navani being a board-certified radiologist as well. (DX 13, 14). Drs. Wheeler and Scott,

both of whom are B-readers and board-certified radiologists, also read the September 5, 1996 x-ray. (DX 21). Dr. Wheeler found that x-ray to be negative for pneumoconiosis. He noted that the x-ray revealed infiltrate or fibrosis lateral portion right upper lung and right apex and small nodules in periphery both upper lobes with minimal bilateral apical pleural thickening and few calcified granulomata compatible with TB unknown activity, probably healed. While he found that a few nodules could be pneumoconiosis, he stated that the asymmetrical upper lobe disease with apical and pleural involvement all favored conglomerate TB. He suggested a CT scan for more detail. Dr. Scott found that x-ray to be positive for simple pneumoconiosis only. He noted that there were peripheral infiltrates/fibrosis compatible with TB, unknown activity. He further found "probable granulomatous masses right apex although cancer cannot be excluded." Dr. Fino, a B-reader, read the September 5, 1996 x-ray as negative for pneumoconiosis. (DX 24).

The April 30, 1997 x-ray was read by Drs. Scott and Wheeler as negative for pneumoconiosis. (DX 30). Dr. Scott noted that there was infiltrate/fibrosis right upper lung compatible with healed TB, cannot rule out activity. On his x-ray report form, Dr. Wheeler noted moderate fibrosis and/or infiltrate right apex and RUL with possible few small calcified granulomata and moderate right apical pleural thickening with minimal left apical pleural thickening and few scars in left apex compatible with TB unknown activity, probably healed.

A CT scan of the chest taken on April 30, 1997 was read by Dr. Wheeler, who found that there were linear and irregular scars in right upper lung and both apices with moderate right apical and upper chest wall pleural fibrosis and minimal left apical thickening. He found a 2 x 4 cm. oval mass in the right upper lung, which in his opinion was not a large silicotic opacity because (1) there was no symmetrical small background nodules in mid and upper lungs; and (2) the scarring involved apices and pleura which silicosis and CWP do not involve. Dr. Wheeler stated that untreated or undertreated TB leaves scarring which is almost always asymmetrical. Dr. Wheeler explained as follows:

Very rarely a large silicotic opacity will take up all the background nodules but in this case there is no sign of nodules in central portion LUL and silicosis and CWP typically begin as symmetrical nodules in central portion upper lobes and they predominate centrally in advanced cases when they spread to the periphery including apices.

Dr. Terrell Estes read the CT scan dated April 30, 1997, finding it to be indicative of a conglomerate pneumoconiosis. Specifically he found numerous small interstitial nodules in the mid and upper lung zones predominantly, some of which ranged in size from 2 to 4 mm. In diameter primarily. He also found coalescent lesions to also be present, the largest of these being in the right apex and measuring 1.9 x 3.1 cm. A 1.0 x 1.7 cm. confluent lesion was also found in the right upper lobe. Dr. Fino also read the CT scan, finding it to be consistent with old granulomatous disease, and not pneumoconiosis. (DX 32).

By letter dated March 19, 1997, Dr. Forehand stated that the Miner was tested for tuberculosis on March 13, 1997 and there was no evidence of the disease. (DX 22). In his report of May 5, 1997, Dr. Dale Sargent stated that he had examined the Miner on April 20, 1997. (DX 31). Based upon his examination, which included a review of a chest x-ray, Dr. Sargent found

simple pneumoconiosis as well as a nodular lesion in the right upper lobe which he felt could indicate a category A large opacity or conglomerate pneumoconiosis. Dr. Sargent stated that the lesion was questionable, as it could be a large opacity or previous granulomatus infection, noting that without pathologic tissue for examination, it "may well be impossible to distinguish between these two."

In his report dated October 2, 1997, Dr. Fino stated that he had reviewed the medical evidence of record. (DX 33). Based upon his review, Dr. Fino found that the Miner did not suffer from simple or complicated pneumoconiosis.

The deposition testimony of Dr. Sargent was taken on October 17, 1997. (DX 34). Dr. Sargent testified that upon reviewing the x-ray and CT scan which were performed during his examination of the Miner, he found simple pneumoconiosis and a questionable right upper lobe lesion. He added that on his review of an x-ray taken in 1987, he had found no large opacities to be present, further noting that it would be unlikely for complicated pneumoconiosis to develop from 1987 to 1997, given that the Miner had ceased his coal mine dust exposure. Dr. Sargent also opined that a negative skin test for tuberculosis did not absolutely rule out the presence of tuberculosis in the lungs. While it made it less likely, it did not completely exclude it.

Given the results of the autopsy, it is apparent that Drs. Forehand, Estes and Navani provided the correct diagnosis of the Miner's condition, including the absence of tuberculosis. I do not find Employer's reliance on the reading of autopsy slides by Dr. Caffrey to be persuasive evidence that the complicated pneumoconiosis from which the Miner suffered was not present in 1996 or 1997. This is so, not only in light of the x-ray and CT scan readings of Drs. Forehand, Estes and Navani, but also in light of the negative tuberculosis test and the autopsy report. Furthermore, I find Dr. Caffrey's opinion on the issue of whether the Miner had complicated pneumoconiosis in 1997 to be equivocal at best, given that he opined as to what "most likely" happened in this case, further agreeing, upon questioning by Employer's counsel, that it was "possible" that the Miner did not have complicated coal worker's pneumoconiosis in 1997. The evidence establishes that it is more likely that the Miner did, in fact, have complicated pneumoconiosis in 1997 and perhaps even earlier. In so concluding, I base my opinion on the findings rendered by Drs. Navani, Estes and Forehand, as well as the negative tuberculosis test, when these are viewed in conjunction with the autopsy report. I further find the medical opinions of Drs. Scott, Wheeler, Scaterige and Fino to be worthy of less weight, given the newly submitted medical evidence which renders their conclusions and reliance on etiologies such as tuberculosis for the Miner's findings of x-ray and CT scan, decidedly less persuasive. I also rely on the prosector's finding on examination of the lungs, which findings were not limited to the right or left lung, and indeed, specifically found coal worker's pneumoconiosis lesions to be present in both lungs. That the few slides of the lung which were reviewed by Dr. Caffrey did not include evidence of this finding does not negate the fact that the prosector made such findings. The findings of complicated pneumoconiosis on autopsy buttress the findings previously made by those physicians who found complicated pneumoconiosis to be present in 1996 and 1997, as well as highlight the error in the findings made by Drs. Scott and Wheeler with regard to certain changes in the lung being due to tuberculosis and/or cancer.

In sum, I find that the totality of the medical evidence supports a finding that a mistake in a determination of fact was made by Judge Levin, who, when weighing the medical evidence, did not have the opportunity to review the autopsy report. I find the evidence sufficient to establish that the Miner was suffering from complicated pneumoconiosis as early as 1996 and 1997, when the x-ray and CT scan evidence was so read by several physicians.

### Conclusion

In sum, the newly submitted medical evidence establishes the existence of complicated coal worker's pneumoconiosis, and that there was a mistake in a determination of fact in the prior decision rendered by Judge Levin. Accordingly, a material change in conditions has been established and the Miner was entitled to benefits during his lifetime.

### Date of Entitlement

In the case of a miner who is totally disabled due to pneumoconiosis, benefits commence with the month of onset of total disability. Where the evidence does not establish the month of onset, benefits begin with the month that the claim was filed. 20 CFR § 725.503(b). In the instant case, the Miner filed his claim for benefits in July of 1996. Chest x-rays taken in 1996 and 1997 and a CT scan taken in 1997 were read as positive for complicated pneumoconiosis. That does not definitively establish the date the Miner first suffered from complicated pneumoconiosis. I therefore find the Claimant entitled to benefits from the month in which the Miner filed his claim for benefits, i.e. July of 1996.

### Attorney's Fees

The Regulations address attorney's fees at 20 CFR §§ 725.362, 365 and 366. Claimant's attorney has not yet filed an application for attorney's fees. Claimant's attorney is hereby allowed thirty days (30) days to file an application for fees. A service sheet showing that service has been made upon all parties, including the Claimant, must accompany the application. The parties have ten days following service of the application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

## **ORDER**

The claim for benefits filed by GEORGE KEEN and pursued by his widow, IOLA C. KEEN is hereby GRANTED.

**A**  
THOMAS M. BURKE  
Associate Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 CFR § 725.481 (2002), any party dissatisfied with this decision and order may appeal it to the Benefits Review Board within 30 days from the date of this decision and order, by filing a notice of appeal with the Benefits Review Board at P.O. Box 37601, Washington, DC 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esq. Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Ave., NW, Washington, D.C. 20210.